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While in *Graham* it was suggested that a history of accidents or complaints might bring a danger that does not appear unusual, unseen, unfamiliar or otherwise special within the scope of the duty,¹⁹ Lord Bracadale held in *Cowan* that an absence of previous accidents or complaints was not a consideration that could be given much weight.²⁰ Notwithstanding the alleged presence of ha-has in country houses,²¹ Lord Bracadale was firmly of the view that this was “an unusual feature about which someone crossing in the dark would be likely to be unaware”.²² He also considered the annual bat walk itself to be an unusual event, because visitors were not normally brought onto the property after dark. In short, a clean record gained in normal circumstances will not be decisive when circumstances change significantly.

Lord Bracadale described the case as being fact specific.²³ This appears to be an inherent feature of occupiers’ liability and *Cowan* serves as a useful reminder that the question of what care is reasonable “always relates to the particular person in the case”.²⁴ It follows that the circumstances under which a person comes onto the property continue to be factually relevant notwithstanding the abolition of the rigid categories of invitee, licensee and trespasser.²⁵ Whether that relevance is truly restricted to the factual question of reasonable care or intrudes into the issue of duty may provide scope for further discussion. If there is any merit in the contention of counsel for the pursuer in *Graham* that “the ambit of an occupier’s duty required to be considered afresh in the circumstances of each particular case”,²⁶ then, in the context of obvious dangers at least, some conceptual overlap may be found between the existence of the duty and its breach.

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The Agent’s Warranty of Authority: Thus Far but No Further

As a general rule, an unauthorised agent is unable to create binding legal relations between his principal and a third party. The third party who is unaware that the agent lacks authority suffers disappointed expectations, since the anticipated contract with

¹⁹ *Graham* at 61 per Lord Emslie.

²⁰ *Cowan* at para 36.

²¹ It is understood that ha-has feature in John Buchan’s *Huntingtower* and possibly also in George Eliot’s *Middlemarch*, though the author does not claim to have read either.

²² *Cowan* at para 36.

²³ Para 38.

²⁴ Gill (n 5) para 325 with reference to s 2(1) of the Act: “[b]ecause the duty to the person in the 1960 Act is to show reasonable care ‘that that person will not suffer injury or damage’” (emphasis added).

²⁵ *Ibid*. See also DM Walker, *The Law of Delict in Scotland*, 2nd edn (1981) 581 and 585.

²⁶ *Graham* at 60.

the principal does not materialise, and is protected in different ways. The principal may choose to ratify the transaction, in which case it becomes binding on both parties from the moment the agent purported to enter into it on the principal's behalf. The principal who does not wish to ratify may nevertheless have created the impression that the agent was authorised, potentially resulting in apparent authority. This legal concept operates to prevent the principal from acting in an inconsistent way by creating then denying the appearance of authority and if the third party raises an action against the principal, the latter is barred from denying that the agent was authorised. Both ratification and apparent authority focus on the relationship between principal and third party. However, the third party also has a valid action against an agent who has misrepresented the existence or extent of his authority, namely the action for breach of warranty of authority. There is very little Scottish case law on this action, and so the recent Inner House joined cases, *Cheshire Mortgage Corporation Limited v Grandison* and *Blemain Finance Limited v Balfour Manson LLP*,¹ provide a welcome analysis of the legal principles.

A. NATURE OF THE WARRANTY

An agent provides an implied warranty to third parties that he is authorised by his principal. If that warranty proves to be incorrect, provided the third party relied on the warranty and has suffered a loss, the agent may be liable in damages to the third party.

The action is an unusual one and appears not to be a native Scottish concept, having simply been adopted into Scots from English law. It is based on an implied contract and as such imposes strict liability on the agent, with the result that even the agent who honestly believes he is authorised will be liable to the third party in damages if such a belief was incorrect.

In these joined cases the attempt to extend the ambit of the warranty of authority was unsuccessful. Lord Clarke, delivering the Inner House decision, stated:²

We are of the clear view that there are no reasons in principle or practice, for extending the somewhat limited scope and nature of the implied warranty of agents in the way in which the reclaimers' submissions in the present case contended for.

B. THE FRAUDULENT SCHEMES

These cases arose as a result of fraudulent schemes, the nature of which can be illustrated by reference to the facts in *Cheshire*. A man and a woman approached lenders purporting to be real individuals, the aptly-named Mr and Mrs Cheetham of 34 Danube Street, Edinburgh. The couple requested a loan which was to be secured over the property in Danube Street. The fraud was very convincing as the fraudsters possessed a number of documents including drivers' licences and utility bills. On the

1 [2012] CSIH 66, [2013] PNLR 3.

2 [2012] CSIH 66 at para 31.

day the offer letter was issued, they consulted a solicitor, instructing him to act on their behalf. They explained that the title deeds had been lost and extract registered title deeds were produced. The solicitor acted only for the borrowers (and not also the lenders) in procuring the loan from the lenders. Once the loan had been obtained the fraudsters disappeared leaving the lenders with a standard security which, having been granted by a non-owner, was ineffective.

The lenders chose to sue the solicitors acting for the fraudsters on the basis of warranty of authority. It is well established that a solicitor acting as an agent warrants to the party his client is transacting with (on these facts, the lenders) that he was authorised. But does the solicitor further warrant that his client is who he claims to be? This is the essential question raised by the joined cases, namely, as is so often the case in agency, which of two innocent parties should bear the loss caused by fraudulent actions.

C. OUTER HOUSE DECISION³

In the Outer House Lord Glennie rejected the lenders' submissions:⁴

...it is, in my opinion, difficult to see any room for any implied representation by the solicitors as to the identity of the borrowers for whom they were acting, other than that they were acting for the people with whom the lenders were already engaged in a process of finalising a loan transaction. Borrowing from Willes J's formulation of the warranty in *Collen v Wright* [1857 8 E & B 647], the solicitors here in each case did not (sic) more than warrant "that the authority which (they professed) to have, did in point of fact exist."

It was clearly relevant to Lord Glennie that the borrowers approached the lenders directly, and were not introduced by the solicitors.

Lord Glennie also shed light on the legal basis of the action. Drawing on the judgment of Buxton LJ in *SEB Trygg Liv Holding AB v Manches*⁵ he noted that it is based on an implied collateral contract existing between agent and third party. This is, of course, a legal fiction: there is no such contract. The contractual analysis causes difficulties in English law because of the requirement of consideration since the third party who benefits from the warranty seems to "get something for nothing". Consideration is, however, found in the act of the third party in entering into the contract with the principal. Although Lord Glennie recognised that consideration is not a requirement in Scots law, he nevertheless felt that it served a useful function:⁶

...the acts which amount to consideration may also indicate the acceptance necessary to turn the representation or unilateral promise by the agent into a contract between the agent and third party collateral to that purportedly entered into between the third party and the agent's professed principal.

His reference to a unilateral promise is interesting and is revisited below.

³ *Cheshire Mortgage Corporation Limited v Grandison* [2011] CSOH 157, 2012 SLT 672.

⁴ [2011] CSOH 157 at para 64.

⁵ [2006] 1 WLR 2276 at para 60.

⁶ [2011] CSOH 157 at para 56.

To Lord Glennie, outcomes are highly dependent on the facts:⁷

...one cannot simply assume the existence of a warranty of authority in all cases. It is necessary in each case to look at the relationship between the parties, and to examine closely what was said, expressly or impliedly, by the agent in the context of that relationship, how what was said could reasonably have been understood by the other party (the test, as always in contract, being objective.)

This provides a reminder that the warranty is an implied one, shaped by the nature of the legal relationship between agent and third party. An express warranty is possible, if unlikely.

Quoting the decision of Lord Drummond Young in a recent case concerning a similar type of fraud, Lord Glennie confirmed the limited scope of the warranty:⁸

Thus the representation relates to the person for whom the supposed agent purports to act. It does not relate to the capacity in which that person, the supposed principal, will enter into the transaction, or as to the property that person holds, or as to that person's title to property.

Finally, he confirmed that liability is strict: it makes no difference to the agent's liability that he honestly believed himself to be authorised.⁹

Returning to the facts, Lord Glennie sought to establish whether the warranty in this case could extend to the principal's identity. He emphasised the high degree of contact between the mortgage company and the fraudsters before the solicitor became involved.¹⁰

Of particular importance, to my mind, is the fact that, by the time the borrowers' solicitors became involved, the lenders knew who they were (or thought they were) dealing with. They had made the decision in principle to lend to those individuals.

Lord Glennie's decision illustrates the fact that the third party must be induced by the agent to enter into a contract with the principal: if the third party knows that the agent is not authorised, there can be no action for breach of warranty.

Although the researches of counsel could find no reported Scottish case in which an agent had actually been held liable for breach of warranty of authority, judicial analysis nevertheless exists in cases such as *Anderson v Croall*,¹¹ *Rederi Aktiebolaget Nordstjernen v Christian Salvesen & Co*,¹² *Irving v Burns*,¹³ and *Scott v JB Livingstone & Nicol*.¹⁴

7 Ibid.

8 Para 57, quoting from *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2009] CSOH 165, 2010 SLT 527 at para 27.

9 Para 58.

10 Para 63.

11 (1903) 6 F 153.

12 (1903) 6 F 64.

13 1915 SC 260.

14 1990 SLT 305. To these could be added *Royal Bank of Scotland v Skinner* 1931 SLT 382, in which Lord MacKay confirmed the requirement of reliance on the warranty.

D. INNER HOUSE DECISION¹⁵

The Inner House decision begins with the statement of principle from Willes J in *Collen v Wright*:¹⁶

I am of opinion that a person, who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue... The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such a contract, upon the faith of the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent, as such, is good consideration for the promise.

Lord Clarke characterised this statement as the simple process of implying a term into mercantile transactions, drawing an analogy with the implied terms in the Sale of Goods Act 1979 and the Bills of Exchange Act 1882.

He noted that this action had been received into Scots law from English law, making reference to a statement of the law contained in Gloag and Henderson, *The Law of Scotland*.¹⁷ He also referred to *Irving v Burns*¹⁸ both to illustrate the fact that the third party must actually suffer a loss and to emphasise the limited nature of the warranty. If the contract with the principal would have been a losing one anyway, for example because the principal was insolvent, the agent has not caused a loss and will not therefore be liable in damages.

Given that this is an English concept, reference was made to the leading English text, which states:¹⁹

The basic warranty is only that the agent has authority from his principal: this is something particularly within the agent's knowledge. If the principal proves unreliable, that is something in respect of which the third party could have made inquiries. Merely as agent, therefore, the agent does not warrant that his principal is solvent, or will perform the contract (if any). As can be seen below, in the context of litigation, the warranty is similarly limited in that the agent (normally a solicitor) does not promise that a claim is valid.

Lord Clarke noted (as Lord Glennie had done in the Outer House) the classification in English law as a collateral contract and the requirement of consideration.²⁰ *Excel*

15 [2012] CSIH 66, [2013] PNLR 3.

16 1857 8 E & B 647 at 657.

17 Lord Coulsfield and H L MacQueen, *Gloag and Henderson: The Law of Scotland*, 12th edn (2007) para 19.26, contributed by Lord Coulsfield.

18 1915 SC 260.

19 P G Watts and F M B Reynolds, *Bowstead and Reynolds on Agency*, 19th edn (2010) art 105.

20 [2012] CSIH 66 at para 26.

Securities Ltd v Masood,²¹ a case involving a similar identity fraud, was described by the court as being “good law for Scotland”.²² Lord Clarke quoted from the opinion of Judge Hegarty in that case:²³

An agent acting on behalf of an unidentified principal will not normally incur any personal, contractual liability so long as he acts within the scope of his authority. Anyone contracting with such an agent must look to the principal for any redress to which he is entitled as a matter of contract. However, it is now well established that, in such circumstances, the agent will normally be regarded as giving an implied warranty as to his authority. If, therefore, he never had authority to act on behalf of the principal or if his authority has terminated or if he exceeds the scope of his authority, he will be in breach of the implied warranty and will be liable in damages to any person to whom the warranty was given. In the common case, where the principal refuses to accept liability, the right of action against the agent for breach of his warranty will be an effective substitute for the loss of any right of action against the principal.

Judge Hegarty had noted the decision in *Penn v Bristol & West BS and Ors*²⁴ and concluded that, notwithstanding the result, it was not the case that the solicitor always warranted his client's identity. The Inner House agreed.²⁵ Lord Clarke concluded as follows:²⁶

The identity of a person is made up from a bundle of qualities or attributes. In particular there is nothing in principle in the law of contract to prevent an agent from guaranteeing to a third party that he has a principal who is the same person as appears on property registers, for example, as the owner of a specific property. . . . but, in any event, where, as here, no such express warranty was asked for, or given, matters must rest on the implied, warranty of authority to be implied as a matter of law the extent and nature of which was defined correctly in the Excel case.

E. CONCLUSIONS

In outlining the limitations on this concept, the Inner House provided a reminder of the policy reasons behind it.²⁷ The agent is in a better position than the third party to verify whether he is actually authorised. As such, it seems fair to allow the loss to fall on the agent rather than on the third party, who might find it difficult to establish the limits of the agent's authority. On these particular facts, to extend the warranty further to encompass the client's identity would be to place on the solicitor a risk which is the lender's risk in making a commercial decision to lend.²⁸ It would, in effect, make the solicitor a type of insurer of the lender's losses. Given the forceful terms of Lord

21 [2010] Lloyds Rep PN 165.

22 [2012] CSIH 66 at para 28.

23 Para 29.

24 [1997] 1 WLR 1356.

25 [2012] CSIH 66 at para 29.

26 Para 30.

27 Para 29.

28 As explained in *Excel Securities Ltd v Mahood* [2010] Lloyds Rep PN 165 at para 102.

Clarke's judgment, future attempts to extend the warranty in other ways are equally unlikely to be successful.

Whilst the restatement of the limitations is welcome, these joined cases highlight the unusual nature of the warranty. The imposition of strict liability on the agent, although the natural result of basing the action in contract, is harsh. A contractual legal basis seems to have arisen through historical accident rather than any deliberate choice: the action was developed before the rise of negligence in delict. Following *Hedley Byrne v Heller*,²⁹ a third party could choose to raise an action against the agent for misrepresentation in delict. Unsurprisingly, there are few examples of third parties choosing this path. The contractual action, which compensates the third party for his disappointed expectations, is likely to result in a higher award of damages than would be the case were the agent to choose the delictual route. However, if the agent fraudulently misrepresented the extent of his authority, higher damages would be available in delict. The contractual legal basis is now firmly embedded in the law.

The existence of the contractual legal basis is all the more unfortunate bearing in mind that the contract is a legal fiction. In English law it is based on an implied collateral contract, consideration being provided when the third party enters into a contract with the principal in exchange for the agent's promise. The contract is unilateral in nature. Scots law has simply adopted this action from English law without pausing to ask whether a neater legal basis in Scots law would have been the unilateral promise.³⁰ The agent can be characterised as promising to the third party that he is authorised. When this promise is breached, the third party has an action against the agent for damages. Promise more accurately reflects the one-sided nature of the dealings between agent and third party, for the third party bears no obligation towards the agent. Neither legal team in the joined cases appears to have raised promise as a possible legal basis in the Inner House, despite Lord Glennie's brief reference to promise in the Outer House, as noted above.

Given the English attitude towards privity of contract, promise cannot be used as a legal basis in English law. This explains the choice of the collateral contract, and the search for consideration. It is unsatisfactory that Scots law has simply adopted a solution which is framed by the presence of consideration in English law. The Inner House having confirmed the nature of the action, it now seems unlikely that promise could be considered as an alternative legal basis. This, in turn, is indicative of a wider problem, namely the failure to take account of promise as a possible solution in commercial situations. It is a flexible and useful part of Scots law, particularly bearing in mind that, in a commercial context, it need not be in writing.³¹ Complex commercial contexts often involve the interaction of numerous commercial actors and

29 [1964] AC 465.

30 The current author originally made this suggestion in "Unauthorised agency in Scots Law", in D Busch and L Macgregor (eds), *The Unauthorised Agent: Perspectives From European and Comparative Law* (2009) 261 at 291-296.

31 Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).

the ability to recognise binding unilateral legal commitments is a facet of the Scottish system which is unfortunately often ignored.

These are criticisms which relate to the structural nature of the action. It would, of course, be unreasonable to expect the court completely to reshape the remedy in the context of litigation. More radical change would only be possible if the issue were considered by the Scottish Law Commission. In the meantime, we should welcome the Inner House's refusal to extend an already anomalous concept in a way which would have been practically unworkable for the solicitors' profession as a whole.

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Unjustified Enrichment Claims: When Does the Prescriptive Clock Begin to Run?

Two recent judgments of the Outer House of the Court of Session have considered the question of when prescription starts to run in relation to an unjustified enrichment claim. Unfortunately both judgments contain, it is respectfully submitted, errors of analysis which suggest that the Scottish courts are not yet fully at ease with the reformed law of unjustified enrichment developed in the so-called "enrichment revolution" of the late 1990s. The present author has recently called, in discussing another unjustified enrichment decision, for further development of the law by the Inner House.¹ The cases discussed below add further weight to this call.

Claims in unjustified enrichment are based upon a cause of action which rests, in broad terms, on the principle that no-one should be unjustifiably enriched at the expense of another.² This principle may be broken down into several elements which must be present before a claim in unjustified enrichment arises: (1) a gain made by the defender, (2) at the expense of the pursuer, (3) which is unjustifiably retained by the defender. One might also add a fourth requirement, that no relevant defence is available to the defender, but this final consideration is not of primary importance in calculating when prescription runs in enrichment claims. For that calculation, what is crucial is the moment when the defender unjustifiably retains an enrichment at the pursuer's expense. It is that concurrence of the specified elements (1) to (3) above that constitutes "the date when the obligation became enforceable", which is the time specified in section 6(3) of the Prescription and Limitation (Scotland) Act 1973 as the moment from which the five year prescriptive period applicable to obligations arising from unjustified enrichment begins to run.

¹ See M Hogg, "Continued uncertainty in the analysis of unjustified enrichment" 2013 SLT (News) 111.

² *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151 at 155 per Lord President Hope.